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IN THE

Supreme Court of the United States

TERM, 1966
No. 1191

In the Matter of

RAMON NAVARRO.

PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	3
United States Constitutional Provisions Involved	3
Federal Statutes Involved	3
Statutes of the State of California Involved	4
Questions Presented by This Petition	8
Statement of Facts Involved in United States District Court Hearing	9
Statement of the Facts Involved in Original Case Before State Court in California	14
Reasons for Granting the Writ	17
A. The Federal Court Violated Petitioner's Constitutional Rights	17
B. The State Court Violated Petitioner's Constitutional Rights	19
Basis for Federal Jurisdiction in the Court of First Instance	28
Stages of the Proceedings in the State Courts at Which, and the Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised	30
Conclusion	32

INDEX TO EXHIBITS

Exhibit A. Opinion of the United States Court of Appeals for the Ninth Circuit 1

Exhibit B. Decision, dated December 22, 1966 3

Exhibit C. Order Staying Issuance of Mandate, dated December 27, 1966 4

Exhibit D. Order Staying Issuance of Mandate, dated January 13, 1967 5

Exhibit E. Order Staying Issuance of Mandate, dated February 23, 1967 6

TABLE OF AUTHORITIES CITED

Cases	Page
Brown v. Allen, 344 U.S. 443, 97 L. Ed. 469	29
Dictograph Products v. Sonotone, 230 Fed. 131	18
Efron v. Kalmanovitz, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107	24
Escobedo v. Illinois, 378 U.S. 478	27
Garner v. Louisiana, 7 L. Ed. 2d 207	20
Garton v. Tinsley, 171 F. Supp. 387	29
Giordenello v. United States, 357 U.S. 460	27
Green v. Bomar, 329 F. 2d 796	18
Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891	25, 26
Leyra v. Denno, 347 U.S. 556, 98 L. Ed. 948	27
Los Angeles v. Pacific Elec. Ry. Co., 168 Cal. App. 2d 224, 335 P. 2d 1042	23
Los Angeles County v. Read, 193 Cal. App. 748, 14 Cal. Rptr. 628	22
McLaughlin v. Florida, 379 U.S. 184, 13 L. Ed. 2d 222	19
People v. Amden, 123 Cal. App. 2d 951	21
People v. Dorado, 62 Cal. 2d 338	28
People v. Elliot, 54 Cal. 2d 498	21
People v. Gilbert, 25 Cal. 2d 422	20
People v. Gossman, 95 Cal. App. 2d 293	25
People v. Holtzendorff, 177 Cal. App. 2d 788, 2 Cal. Rptr. 676	23
People v. Horiuchi, 114 Cal. App. 415	20
People v. Howard, 111 Cal. 655	21
People v. Perez, 198 A.C.A. 489, 18 Cal. Rptr. 164	23

Page

People v. Townsend, 214 Mich. 267 25

Parr v. United States, 363 U.S. 370 21

Quirin, Richard, Ex parte, 63 S. Ct. 22, 87 L. Ed. 3.. 20

Richardson v. San Diego, 193 Cal. App. 2d 648, 14 Cal. Rptr. 494 23

Rinaldi v. Yeager, 16 L. Ed. 2d 577 19

Rogers v. State of Alabama, 192 U.S. 226 24

Sanders v. United States, 373 U.S. 1, 10 L. Ed. 2d 148 19

Simpson v. Cranston, 56 Cal. 2d 63, 362 P. 2d 492 .. 23

Sunday Lake Iron Company v. Township of Wakefield, 247 U.S. 352 24

Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770 ..... 18, 19

United States v. Baumart, 179 Fed. 735 26

United States v. Langsdale, 115 F. Supp. 489 26

United States v. Ruroede, 220 Fed. 210 26

United States v. Wells, 225 Fed. 320 26

United States v. Wheeler, 256 F. 2d 745 ..... 17, 18

United States v. Whiting, 311 F. 2d 191 18

United States Ex rel. King v. Gokey, 32 F. 2d 793 26

Voight v. Webb, 47 F. Supp. 743 21

Wallace v. State Personnel Board, 168 Cal. App. 2d 543, 336 P. 2d 223 23

Wells v. Justice, 181 Cal. App. 2d 221 27

Wirin v. Parker, 48 Cal. 2d 890 24

Rules Page

Federal Rules of Civil Procedure, Rule 15(a) 12

Rules of the Supreme Court of the United States, Rule 19(1)(b) 18

Rules of the United States Court of Appeals for the Ninth Circuit, Rule 14 13

Statutes

California Penal Code, Sec. 740 .....7, 22, 26

California Vehicle Code, Sec. 15 6

California Vehicle Code, Sec. 501 25

California Vehicle Code, Sec. 502 25

California Vehicle Code, Sec. 23101 .....7, 25

California Vehicle Code, Sec. 23102 .....6, 14, 25

California Vehicle Code, Sec. 23102(a) 14

California Vehicle Code, Sec. 40300 4

California Vehicle Code, Sec. 40301 4

California Vehicle Code, Sec. 40302 .....4, 25

California Vehicle Code, Sec. 40306 .....5, 22, 26

California Vehicle Code, Sec. 40306(a) 22

California Vehicle Code, Sec. 40307 6

United States Code, Title 28, Sec. 1254 3

United States Code, Title 28, Sec. 2243 .....3, 11, 12

United States Code, Title 28, Sec. 2251 .....4, 10, 12

United States Code, Title 28, Sec. 2254 29

United States Constitution, Fourteenth Amendment 3, 8, 9, 20, 21, 24, 26, 28, 30

IN THE

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TERM, 1966

No. .....

In the Matter of

RAMON NAVARRO.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren and to the Justices of the Supreme Court of the United States:

Your petitioner, Ramon Novarro, respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse its decision made on November 14, 1966, denying your petitioner a Writ of Habeas Corpus, or Order to Show Cause and hearing thereon, or an Order Allowing Amendment of his petition in the District Court.

Opinion Below.

At 368 F. 2d 803 is the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Novarro v. Pitchess,* decided by the Per Curiam Decision on November 14, 1966. The Petition for Rehearing was denied on December 22, 1966.

Thereafter an Order Staying Issuance of Mandate was granted to give the petitioner the opportunity to petition this Court for certiorari. Said Order was granted on December 27, 1966, and was conditioned upon petitioner filing his petition for a Writ of Certiorari with the clerk of this Court on or before January 27, 1967.

Thereafter another Order Staying Issuance of Mandate was granted to petitioner granting a further extension of time to February 27, 1967, within which petitioner may petition this Court for a Writ of Certiorari. Said Order was issued on January 16, 1967.

Thereafter another Order Staying Issuance of Mandate was granted to petitioner granting a further extension of time to March 27, 1967, within which petitioner may petition this Court for a Writ of Certiorari. Said Order was issued on February 23, 1967.

A copy of said Decision of November 14, 1966, is attached hereto and made a part hereof by reference and is marked Exhibit A in Appendix.

A copy of said Decision of December 22, 1966, denying a rehearing is attached hereto and made a part hereof by reference and is marked Exhibit B in Appendix.

A copy of said Order Staying Issuance of Mandate which was dated December 27, 1966, is attached hereto and made a part hereof by reference and is marked Exhibit C in Appendix.

A copy of said Order Staying Issuance of Mandate which was dated January 16, 1967, is attached hereto and made a part hereof by reference and is marked Exhibit D in Appendix.

A copy of said Order Staying Issuance of Mandate which was dated February 23, 1967, is attached hereto and made a part hereof by reference and is marked Exhibit E in Appendix.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1254, which provides in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil, or criminal case, before or after rendition of judgment or decree. . . ."

United States Constitutional Provisions Involved.

The 14th Amendment to the Constitution of the United States guarantees to your petitioner equal protection of the laws, and his right not to be deprived of his liberty without due process of law.

Federal Statutes Involved.

Title 28, U.S. Code, Section 2243, reads, in part as follows:

> "A court, justice or judge entertaining an application for a writ of *habeas corpus* shall forthwith award a writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

Title 28, U.S. Code, Section 2251, reads, in part, as follows:

> "A justice or judge of the United States before whom a *habeas corpus* proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the *habeas corpus* proceeding."

Statutes of the State of California Involved.

The following Paragraphs of the Vehicle Code of the State of California, read as follows:

Section 40300: Application of Chapter.

> "The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade."

Section 40301: Procedure.

> "Except as provided in this chapter, whenever a person is arrested for any violation of this code declared to be a felony, he shall be dealt with in like manner as upon arrest for the commission of any other felony."

Section 40302: Mandatory Appearance.

> "Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in

which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases:

(a) When the person arrested fails to exhibit his driver's license or other satisfactory evidence of his identity.

(b) When the person arrested refuses to give his written promise to appear in court.

(c) When the person arrested demands an immediate appearance before a magistrate.

(d) When the person arrested is charged with violating Section 20001, 23102, 23105 or 23106."

Section 40306: Misdemeanor Procedure before Magistrate.

"(a) Whenever a person is arrested for a misdemeanor and is taken before a Magistrate, *the arresting officer shall file with the Magistrate a complaint stating the offense with the Magistrate a complaint stating the offense with which the person is charged.* (italics supplied.)

(b) The person taken before a Magistrate shall be entitled to at least five days continuance of his case in which to plead and prepare for trial and the person shall not be required to plead or be tried within the five days unless he waives such time in writing or in open court.

(c) The person taken before a Magistrate shall thereupon be released from custody upon his own recognizance or upon such bail as the Magistrate may fix."

Section 40307: Magistrate Unavailable.

"(a) When an arresting officer attempts to take a person arrested for a misdemeanor violation of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested before the clerk of the magistrate or the officer in charge of the most accessible county jail, city jail, or other place of detention within the county, who shall admit him to bail in accordance with a schedule, fixed as provided in Section 1269 (b) of the Penal Code."

Section 15 "SHALL" and "MAY"

" 'Shall' is mandatory and 'may' is permissive."

Section 23102: Misdemeanor Drunk Driving.

"(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the County Jail for not less than thirty days nor more than six months, or by fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred Dollars ($500.00) or by both such fine and imprisonment, and upon a second or any subsequent conviction by imprisonment in the County Jail for not less than five days nor more than one year and by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00). A conviction under this section shall be deemed a second con-

viction if the person has previously been convicted of a violation of Section 23101 of this Code.

(b) Any person convicted of a second or subsequent offense under this section shall not be granted probation by the court, nor shall the court suspend the execution of the sentence imposed upon such person."

Section 23101: Felony Drunk Driving.

"Any person who, while under the influence of intoxicating liquor drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State Prison for not less than one year nor more than five years, or in the County Jail for not less than ninety days nor more than one year and by fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Thousand Dollars ($5,000.00)."

The Penal Code of the State of California, Part 2, Title 2, Section 740 reads as follows:

"Section 740. (Public Offenses Triable in Inferior Courts: Prosecution by Written Complaint Under Oath: Verification on Information and Belief.) *Except as otherwise provided by law,* (italice supplied) all 'public offenses triable in the inferior courts must be prosecuted by written complaint under oath and subscribed by the complainant. Such complaint may be verified on information and belief."

Questions Presented by This Petition.

1. In the absence of emergency or unavailability is it an abuse of discretion for a different judge of the same district court to hear or consider an application for writ of habeas corpus already considered and preliminarily ruled upon by another Judge?
2. Whether the Honorable United States District Court for the Southern District of California, Central Division, committed reversible error in failing to conform to the procedural requirements as set forth in the aforementioned federal statutes, in that said Court, the Honorable Leon Yankwich presiding, failed to issue a writ of *habeas corpus* or, in the alternative, order a hearing on the merits of petitioner's (appellant's) petition for that writ when good cause appeared for the issuance of same from the application for the writ?
3. The statute under which petitioner was convicted clearly and unequivocally states that *only an arresting officer may swear out a complaint against an accused* (our emphasis). In the present case, the arresting officer did not swear out a complaint against your appellant. Does failure to conform to the particular type of statute in question, by State authorities, constitute a violation of due process and equal protection as provided by the Fourteenth Amendment to the United States Constitution?
4. When a State provides procedural safeguards to an accused and then disregards those safeguards in bringing a person to trial, does this—in and of itself—constitute a violation of the equal-protection and due-process clauses of the Fourteenth Amendment to the United States Constitution?

5. When officials of a State, in bringing a criminal proceeding against a defendant, break the laws of said State which provides procedural safeguards for the protection of said defendant, does this—in and of itself—constitute a violation of due process and equal protection as provided by the Fourteenth Amendment to the United States Constitution.

6. May evidence be used against a defendant at his trial which consists, in part, of alleged statements made by him and transcribed into a police report, when said statements were elicited without advising said defendant of his right to counsel or his right to remain silent?

Statement of Facts Involved in United States District Court Hearing.

On August 20, 1965, in the United States District Court for the Southern District of California, Central Division, the Honorable Jesse W. Curtis signed a restraining order which prohibited local authorities from interfering in any manner with the liberty of appellant herein, pending his petition for writ of *habeas corpus* before said court. Said cause was transferred to the Honorable Leon R. Yankwich, Judge of the United States District Court for the Southern District of California, Central Division. Judge Yankwich denied appellant's petition for writ of *habeas corpus,* without hearing, on November 16, 1965.

Thereafter, an appeal was filed with the United States Court of Appeals for the Ninth Circuit.

In researching the law for this appeal, it was discovered that appellant, Ramon Novarro, had not ex-

hausted all of his remedies below. Appellant Novarro had the right to move the United States District Court for the Southern District of California, Central Division, for an Order allowing him to amend his petition for a writ of *habeas corpus*. If not for the fact that jurisdiction is presently vested in this Honorable Court, the United States District Court for the Southern District of California, Central Division, would be empowered to grant said motion. In researching further, appellant discovered that, not only did the United States District Court have the power to grant an amendment of his petition, but, it was obligated, under the pleadings, as they stood, to grant, at the very least, a hearing on an order to show cause why a writ of *habeas corpus* should not issue. The rationale on the latter view is as follows:

The United States Code, Title 28, Section 2251 states that a restraining order *MAY* (emphasis ours) be granted pending determination of an application for writ of *habeas corpus*. Clearly, this is not a mandatory provision, the word "*may*" creating a permissible climate for granting a restraining order. On August 20, 1965, the Honorable Jesse W. Curtis, Judge of the United States District Court for the Southern District of California, Central Division, signed and issued a restraining order prohibiting officials of the State of California from taking further proceedings against the liberty of petitioner and appellant herein. This Order is noted on page 11 of the Transcript of Record on Appeal to

the United States Court of Appeals for the Ninth Circuit. The first paragraph of the aforementioned Order reads as follows:

> "GOOD CAUSE APPEARING upon reading the Petition of Ramon Novarro for Writ of *Habeas Corpus* or, in the alternative, for an order staying and restraining the execution of sentence, or for bail, and points and authorities attached thereto, on file herein . . ."

The Honorable Jesse W. Curtis then signed the Order.

The United States Code, Title 28, Section 2243, reads, in part, as follows:

> "A court, justice or judge entertaining an application for a writ of *habeas corpus SHALL* (emphasis ours) forthwith award a writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

The aforementioned Section 2243 contains the word *"shall."* Clearly, this is a mandatory provision.

This cause was transferred from the Honorable Jesse W. Curtis, Judge of the United States District Court for the Southern District of California, Central Division, to the Honorable Leon R. Yankwich, Judge of the United States District Court for the Southern District of California, Central Division. Judge Yankwich neither awarded the writ nor did he issue an Order directing respondent to show cause why the writ should not be issued, nor did he allow petitioner and appellant herein to amend his application for writ of *habeas corpus.*

Since Judge Curtis stated that there *was* good cause showing to issue a restraining order under the United States Code, Title 28, Section 2251, a non-mandatory provision, the procedure for determination of the merit of the petition for *habeas corpus* came under the mandatory provisions of the United States Code, Title 28, Section 2243, *i.e.*, either issue a writ or order a hearing on the merits. This was not done.

The only basis for the court's order denying the petition for writ of *habeas corpus* without a hearing may be that the application therefor shows on its face that the applicant is not entitled thereto.

United States Code, Title 28, Section 2243.

Counsel for petitioner, bearing in mind the United States Code, Title 28, Rules of Civil Procedure, Rule 15(a) (to wit, that amendments to pleadings should be liberally construed), approached the Honorable Leon R. Yankwich. Judge Yankwich, upon hearing counsel for petitioner herein, stated that if jurisdiction were to be revested in the United States District Court for the Southern District of California, Central Division, he would, upon motion being made, order the proceedings reopened in order to allow petitioner herein to amend his petition for writ of *habeas corpus* and would either issue the writ or order a hearing as to why a writ of *habeas corpus* should not be issued, providing the amended petition showed constitutional grounds.

Counsel for respondent, Robert C. Lynch, a staff member of the Office of the County Counsel of the County of Los Angeles, was notified of this turn of events and agreed to sign a stipulation to dismiss the

appeal then pending before the United States Court of Appeals for the Ninth Circuit, without prejudice, if—and only if—the Office of the City Attorney of the City of Los Angeles concurred.

The Office of the City Attorney of the City of Los Angeles refused and still refuses to sign said stipulation.

Inasmuch as the only manner of dismissing an appeal without prejudice before the United States Court of Appeals for the Ninth Circuit, is Rule 14 of the Rules of the United States Court of Appeals for the Ninth Circuit (to wit, both parties, appellant and respondent must so stipulate), and inasmuch as respondent's counsel fails and refuses to stipulate, respondent compels this Honorable Body to determine a constitutional question which is premature, and which, depending upon the determination of the United States District Court for the Southern District of California, Central Division, upon a hearing on an amended petition for a writ of *habeas corpus,* might be totally unnecessary. It is appellant's position that the Honorable United States District Court for the Southern District of California, Central Division, must, as a matter of law, grant a hearing on the petition as submitted without amendment. Nevertheless, appellant does not wish to impose upon the United States District Court and would gladly amend his petition for a writ of *habeas corpus* in conformance with the request of the Honorable Leon R. Yankwich, in order to get a hearing on the merits.

Statement of the Facts Involved in Original Case Before State Court in California.

On February 20, 1962, appellant Novarro was arrested by police officers R. E. Hattey and E. J. Jewell, taken to the police station in the County of Los Angeles, State of California, and charged with violation of Vehicle Code Section 23102. A verified complaint, filed upon information and belief, was later filed by one J. W. Fletcher, who was not one of the arresting officers nor a witness to the arrest. A motion to dismiss the complaint on the ground of lack of jurisdiction, because the complaint was filed on information and belief and *not* by one of the arresting officers, was made before trial on March 21, 1962, and was denied on March 26, 1962, in Division 70 of the Municipal Court of Los Angeles Judicial District in a minute order holding that the said court had jurisdiction of the cause and ordering the trial of the defendant, appellant herein, to proceed. On March 26, 1962, the said court found appellant guilty of a violation of said Vehicle Code Section 23102(a) and continued the matter for sentencing and did sentence appellant, on June 26, 1962, to fifteen days in the county jail of the County of Los Angeles, State of California, plus a fine of $250. At the trial, appellant stood on his motion to dismiss for lack of jurisdiction, and the case was submitted to the Municipal Court on the arrest report.

Appellant filed a petition for a writ of prohibition in the Superior Court of the State of California, for the County of Los Angeles, No. 794977, and an amended petition for writ of prohibition with the said Superior Court, which was denied without hearing on June 15, 1962.

Appellant filed a petition for writ of prohibition with the District Court of Appeal of the State of California, Second Appellate District, 2nd Civil No. 26535, which petition was denied by the said court on June 25, 1962, without opinion.

Appellant petitioned for a hearing before the Supreme Court of the State of California from a denial of the writ of prohibition by the District Court of Appeal. Said petition for hearing was denied by the Supreme Court of the State of California, on July 25, 1962, without opinion.

An appeal from the decision of the Municipal Court of the Los Angeles Judicial District was not filed on behalf of appellant Novarro until notice by the California Supreme Court of its denial, on July 26, 1962; said appeal was dismissed by the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, on its own motion on August 9, 1962, on the ground that it lacked jurisdiction, since no appeal was filed within ten days after sentence had been pronounced on June 26, 1962, as required by statute (while the matter was before the Supreme Court of the State of California on the writ of prohibition).

Appellant then filed for a writ of *habeas corpus* with the Superior Court of the State of California, for the County of Los Angeles, which was denied by said court on August 23, 1962.

Appellant then petitioned for a writ of *habeas corpus* to the District Court of Appeal, Second Appellate District, for the State of California, which petition was denied on September 13, 1962.

Appellant then petitioned the Supreme Court of the State of California for writ of *habeas corpus,* which was denied by said Supreme Court on October 10, 1962.

On October 4, 1962, appellant filed a petition for writ of *habeas corpus* with the United States District Court for the Southern District of California, Central Division, and his petition was denied on the ground that his State remedies had not been exhausted, *i.e.,* that a petition for a writ of *certiorari,* to review the decision of the Supreme Court of the State of California denying the writ of *habeas corpus,* had not been filed with or acted upon by the Supreme Court of the United States.

A stay of execution of the sentence of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, was granted by the said Municipal Court until October 4, 1962. A further stay of execution was granted by the United States District Court for the Southern District of California, Central Division, until such time as petitioner could petition the Supreme Court of the State of California for a stay of execution pending the filing of a petition with the Supreme Court of the United States for writ of *certiorari,* and for further stay, but no later than November 26, 1962. The petition for stay of execution was denied by the Supreme Court of the State of California on or about November 10, 1962, and the petition for a stay of execution filed before this Honorable Court was denied by the Honorable Mr. Justice Douglas on November 21, 1962. Thereafter, and on November 21, 1962, the United States District Court for the Southern District of California, Central Division, or-

dered a stay of execution of sentence, "pending the filing of petitioner's (appellant's) application for a writ of *certiorari* with the Supreme Court of the United States, and not later than January 3, 1963," and further ordered that such stay should continue "pending said filing and disposition of said writ of *certiorari*." Application for writ of *certiorari* was denied.

Reasons for Granting the Writ.

A. The Federal Court Violated Petitioner's Constitutional Rights.

(1) Judge Yankwich acted in excess of his jurisdiction in refusing to honor the finding of his fellow-judge, Judge Jesse W. Curtis.

In *United States v. Wheeler,* 256 F. 2d 745, it was held that a judge could not consider the same matter heard by another judge of that court so long as the first judge was not unavailable. Mere urgency of other business was insufficient to permit transfer of the case to a second judge to re-hear the same facts and rule in a different manner. In other words, a second judge who has taken over from a prior judge must accept, as proper, the order of his predecessor. Since Judge Curtis stated that the petition for *habeas corpus* filed by petitioner, appellant herein, reflected good cause, his successor, Judge Yankwich, was bound to accept that finding, and it was error, therefore, to refuse a hearing on the application for *habeas corpus,* in that it appeared from the application that the applicant was entitled thereto, for if this were not the case, how could the application possibly show good cause to support a restraining order?

The rule in *United States v. Wheeler* has been followed in the 3d Circuit and in the 4th Circuit (see *United States v. Whiting,* 311 F. 2d 191, 196) but the contrary rule prevails in the 2d Circuit (*Dictograph Products v. Sonotone,* 230 Fed. 131). Petitioner is uninformed of a decision in the 9th Circuit. UNDER RULE 19 (1) (b), SUPREME COURT OF THE UNITED STATES REVISED RULES, THIS IS, THEREFORE, AN APPROPRIATE CASE FOR THE EXERCISE OF DISCRETIONARY JURISDICTION OF REVIEW ON CERTIORARI, TO ACHIEVE UNIFORMITY OF DECISION.

Of course in Petitioner's case there is stronger reason for impementing jurisdiction over the practice of the lower Federal Courts in that no testimony has been taken (as there was in Wheeler) in the District Court and both the first Judge and the second Judge acted upon the verified petition alone.

(2) In *Townsend v. Sain,* 372 U.S. 293, 313-314, 9 L. Ed. 2d 770, at 786, this Court stated:

> "(1) There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant . . . No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits . . ."

Note that petitioner has never been granted a hearing by the state courts on his constitutional claim nor has a state court rendered an opinion thereon, other than denial of his application. In *Green v. Bomar,* 329 F. 2d 796, in a habeas corpus proceeding by a state

prisoner, the Circuit Court of Appeals for the Sixth Circuit affirmed the denial of petitioner's writ by the District Court on the ground that "it was apparent on the face of the petition that no constitutional rights of the appellant had been violated"; nevertheless, the Supreme Court, in reliance upon *Townsend v. Sain, supra,* 372 U.S. 293, in a *per curiam* order, "remanded to the United States District Court . . . for a hearing . . ."

(3) In *Sanders v. United States,* 373 U.S. 1, 19, 10 L. Ed. 2d 148, at 163, the Court states that the better practice, if petitioner's pleading is deficient, is "to direct petitioner to amend his motion, see *Stephens v. United States,* 246 F. 2d 607 . . ."

Petitioner has never been given an opportunity to amend his petition. The suggestion by the Circuit Court, in its opinion at page 2, that appellant was afforded an opportunity to amend his petition but declined, is not in accord with the facts. Petitioner's application for a writ was summarily denied without a hearing and petitioner was then, and prior to his appeal herein, denied any opportunity to amend his petition.

B. The State Court Violated Petitioner's Constitutional Rights.

(1) In *McLaughlin v. Florida,* 379 U.S. 184, 196, 13 L. Ed. 2d 222, at 231, the Court struck down "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race." In a more recent case, *Rinaldi v. Yeager,* 16 L. Ed. 2d 577, the Supreme Court held that it was likewise an invidious discrimination to require repayment of a trial transcript by a state prisoner, where no such repayment was re-

quired of one who had been fined, given a suspended sentence, or placed on probation. Petitioner herein is likewise the subject of an invidious discrimination, in that the State of California required him—because he was on bail—to answer to a complaint signed merely on information and belief; whereas prisoners who lack the resources to afford bail can be held to answer only if the arresting officer himself signs the complaint.

(2) Appellant is entitled, under the due-process clause of the Fourteenth Amendment to the United States Constitution, to be tried by the established rules of procedure determined by the legislature.

People v. Horiuchi, 114 Cal. App. 415;

People v. Gilbert, 25 Cal. 2d 422.

As stated in *Garner v. Louisiana,* 7 L. Ed. 2d 207, at page 214:

> ". . . it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support his conviction."
>
> "Constitutional safegaurds for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."
>
> *Ex parte Richard Quirin,* 63 S. Ct. 22, 87 L. Ed. 3.
>
> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.'

> But 'the State may not permit an accused to be hurried to conviction. . . .' *Moore v. Dempsey,* 261 U.S. 86, 91, 67 L. Ed. 543."
>
> *Voight v. Webb,* 47 F. Supp. 743, 746.

Under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process.

Parr v. United States, 363 U.S. 370.

If the complaint filed in this case against appellant was not filed by the arresting officer, as is a mandatory requirement under the statute, then no complaint was actually filed against him, and appellant was found guilty and convicted for a charge that was never properly made in the court. This is a denial of due process under the Fourteenth Amendment to the Constitution of the United States. It is settled that if the defendant had not been legally committed and if the trial court erroneously denies the motion to set aside and permits the action to proceed to judgment, the resulting conviction must be reversed.

People v. Elliot, 54 Cal. 2d 498, 503.

When there are procedural errors in the trial of one accused of a crime, it is true that timely objection must be made to the errors or the errors may be waived.

People v. Howard, 111 Cal. 655.

In appellant's case, however, the objection as to the procedural defect has been relied upon from the beginning of the accusation against him.

The words of a statute are to be interpreted according to their common and ordinary acceptance.

People v. Amden, 123 Cal. App. 2d 951, 970.

Section 40306(a) of the California Vehicle Code is certainly plain and unambiguous when it states that "the arresting officer shall file with the magistrate a complaint stating the offense with which the person is charged." It is true that section 740 of the Penal Code of the State of California states that the complaint may be verified on information and belief, but it also states that it may be verified on information and belief only "except as otherwise provided by law . . ." Certainly it is otherwise provided by law in section 40306 of the California Vehicle Code. Furthermore, it would seem to be pertinent that said section 40306 is found in the Vehicle Code, which deals with misdemeanors and felonies in connection with vehicular activities, whereas section 740 of the Penal Code of the State of California is concerned generally with public offenses. Specific statutes take precedence over general statutes.

> "Since the plain meaning of a statute must be followed, courts are prohibited from speculating that the legislature meant something other than what it said."
>
> *Los Angeles County v. Read* (1951), 193 Cal. App. 748, 14 Cal. Rptr. 628.

> ". . . 'a general (statutory) provision is controlled by one that is special, the latter (special) being treated as an exception to the former (general). A specific provision relating to a particular subject will govern in respect to that subject, as against general provisions, although the latter (general provision), standing alone, would be broad

enough to include the subject to which the more particular provision relates.' *Rose v. State,* 19 Cal. 2d 713, 723-724 . . ."

Los Angeles v. Pacific Elec. Ry. Co. (1959), 168 Cal. App. 2d 224, 335 P. 2d 1042. (Parenthetical words supplied for clarity.)

See also:

Richardson v. San Diego (1951), 193 Cal. App. 2d 648, 14 Cal. Rptr. 494;

People v. Perez (1951), 198 A.C.A. 489, 18 Cal. Rptr. 164.

LIBERAL OR STRICT CONSTRUCTION: The defendant in a criminal case is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language in a statute.

People v. Holtzendorff (1960), 177 Cal. App. 2d 788, 2 Cal. Rptr. 676.

ERRONEOUS CONSTRUCTION: An erroneous administrative construction does not govern interpretation of a statute.

Wallace v. State Personnel Board (1959), 168 Cal. App. 2d 543, 336 P. 2d 223.

SPECIAL AND GENERAL STATUTE: A special statute dealing expressly with a particular subject controls and takes precedence over a general statute covering the same subject.

Simpson v. Cranston (1961), 56 Cal. 2d 63, 362 P. 2d 492.

NECESSITY FOR CONSTRUCTION—UNAMBIGUOUS STATUTE: If a statute is clear, courts

should enforce the legislative intent as disclosed thereby.

Efron v. Kalmanovitz (1960), 185 Cal. App. 2d 149, 8 Cal. Rptr. 107.

(3) It is elementary that public officials must themselves obey the law.

Wirin v. Parker, 48 Cal. 2d 890, 894.

When a statute is passed by the legislature of a State, setting out in particularity what shall happen when a vehicular misdemeanor occurs, and making it mandatory that what shall happen must happen with respect to a complaint stating an offense against the person being charged for the vehicular misdemeanor, and the State and its officers intentionally flaunt the plain wording of the statute, then the person so arrested is being denied the equal protection of the law and due process under the Fourteenth Amendment to the United States Constitution. The purpose of the equal-protection clause of the Fourteenth Amendment is to secure to every person within the States' jurisdiction, protection against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Sunday Lake Iron Company v. Township of Wakefield, 247 U.S. 352.

An actual discrimination arising from the method of administering the law is a potential in creating a denial of equality of rights guaranteed by the law.

Rogers v. State of Alabama, 192 U.S. 226.

A State is not required by the United States Constitution to provide different sets of procedural crim-

inal statutes for different types of crimes; but where different sets of criminal procedural statutes are provided by a State, it cannot deny the right to a person allegedly guilty under one statute providing one procedure by complaining against him under a different statute providing a different procedure.

Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891.

A conviction under section 23101 of the Vehicle Code of the State of California is deemed a conviction *malum in se.* A conviction under a comparable statute in the State of Michigan was so deemed.

People v. Townsend, 214 Mich. 267.

In the State of California, the courts have recognized that the requisite feloneous intent for conviction under section 23101 of the Vehicle Code is the equivalent of that necessary for a conviction under section 23102 of the Vehicle Code. See:

People v. Gossman, 95 Cal. App. 2d 293, holding that a charge under former section 501 of the Vehicle Code will support a conviction under former section 502 of the Vehicle Code—those former sections being present sections 23101 and 23102, respectively, of the Vehicle Code.

The ordinary misdemeanor prosecution procedure is as set out in section 740 of the Penal Code of the State of California. But the misdemeanor with which appellant is charged under section 23102 of the Vehicle Code is not an ordinary misdemeanor. It is a misdemeanor for which, under section 40302 of the Vehicle Code of the State of California, subparagraph (d), the person arrested shall (must) be taken without unnecessary delay before a magistrate. Under section

40306 of the Vehicle Code, when the person is arrested and taken before the magistrate, he is entitled to have the *arresting officer* file with the magistrate a complaint stating the offense for which he is charged. Such rights are not required by the law for arrests of ordinary misdemeanors under section 740 of the Penal Code of the State of California. Nowhere else in the Vehicle Code is there a statute permitting the filing of the complaint by anyone other than the arresting officer.

The equal-protection clause of the Fourteenth Amendment to the Constitution of the United States applies to a criminal case.

Griffin v. Illinois, supra, 351 U.S. 12, 16-18.

J. W. Fletcher was not the officer who arrested appellant, either with or without a warrant. He was not a witness to the alleged misdemeanor. He had no personal knowledge of the facts set out in the complaint. He had no information or belief upon which to base his filing of the complaint against the appellant. His only knowledge with respect to appellant's alleged violation was what he gleaned from the arresting police report, which may or may not have been true. The fact that the complaint may have appeared to have been valid upon its face does not grant the court jurisdiction over the appellant.

United States v. Langsdale, 115 F. Supp. 489;
United States Ex rel. King v. Gokey, 32 F. 2d 793;
United States v. Baumart, 179 Fed. 735;
United States v. Wells, 225 Fed. 320;
United States v. Ruroede, 220 Fed. 210.

In *Wells v. Justice,* 181 Cal. App. 2d 221, at page 225, the California Appellate Court set forth the following:

> " 'The preliminary complaint in criminal proceedings is merely an allegation in writing, signed by a person *who knows the facts,* . . .' (*People v. Tibbitts,* 71 Cal. App. 709, 711, 712 . . .)" (Emphasis ours.)

When a complaint is stated upon information and belief, there is no presumption that the complaint is made on the personal knowledge of the officer complainant.

Giordenello v. United States, 357 U.S. 460, 486.

A trial court which accepts with approval the fruits of a long chain of constitutional and statutory infringements becomes the consummate force in the denial of due process. When the trial court permits itself, under the pressure of a sense of devotion to law enforcement by the State, to become the pinnacle of a pyramid of indignities, offensive to the sense of justice, it loses jurisdiction and is without authority of law to pronounce a valid judgment and sentence.

Leyra v. Denno, 347 U.S. 556, 98 L. Ed. 948.

(4) The arrest report in question herein was introduced into evidence as an exhibit of the People. On the face of that report it is quite apparent that appellant was not warned that statements made by him could be used against him, nor was he advised that he was entitled to the right of counsel.

In *Escobedo v. Illinois,* 378 U.S. 478, at page 490, the Court firmly established that where the police have

determined that a person is a prime suspect in supposing he may have committed a crime, said suspect is entitled to an attorney, and questioning which is aimed at eliciting testimony against the suspect is to be prohibited and any statements excluded.

In *People v. Dorado,* 62 Cal. 2d 338, the court held that a defendant could not be charged with the waiver of the privilege against self-incrimination unless it appears that he was aware of its existence and its surrounding safeguards and voluntarily and intelligently elected to refrain from asserting it. No such evidence exists here. The arrest report, as improper as it may be, clearly seems to indicate that a person in appellant's position as described in the police report, certainly would not be capable of understanding his rights against self-incrimination as provided by the Fourteenth Amendment to the Constitution of the United States.

Basis for Federal Jurisdiction in the Court of First Instance.

Petitioner has pointed out that he filed an appeal (dismissed on motion of the court) with the Appellate Department of the Superior Court of the County of Los Angeles subsequent to the decision of the California State Supreme Court. The same question, the jurisdiction of the Municipal Court, was intended as a substantial ground for appeal; but under the California procedural rules, a decision of the highest court of the State on the question of jurisdiction could not have been had in any event, on an appeal, and an earlier filing of an appeal with the Superior Court would have withdrawn an opportunity for the California State Supreme Court to decide the question.

So long as the highest court of the State has had the facts before it, the determination of the appellant not to proceed by way of an appeal is not determinative of his right to a writ of *habeas corpus* from a federal court. This, in effect, is the holding in *Garton v. Tinsley,* 171 F. Supp. 387, at 389.

That case is in accord with the United States Supreme Court holding in *Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469, to the effect that, so long as the prisoner chooses at least one alternative method in which to bring the question before the highest court in the State, he will be deemed to have exhausted his State remedies within the meaning of Title 28, United States Code, section 2254. (Note, *en passant,* appellant has chosen the two methods available to bring the question before the California State Supreme Court; *i.e.,* by writ of prohibition, by State writ of *habeas corpus.*) In *Brown v. Allen, supra,* Justice Frankfurter, in speaking for the Court, said (344 U.S. at 502):

> "Failure to exhaust an available state remedy is an obvious ground for denying the application. An attempt must have been made in the state court to present the claim now asserted in the district court, in compliance with section 2254 of the Judicial Code. Section 2254 does not, however, require repeated attempts to invoke the same remedy nor more than one attempt where there are alternative remedies. Further, *Darr v. Burford* requires 'ordinarily' an application for *certiorari* to the United States Supreme Court from the state's denial of relief. *cf. Frisbie v. Collins,* 342 US 519, 520-522, 96 L. Ed. 541, 544, 545; 72 S. Ct. 509."

Stages of the Proceedings in the State Courts at Which, and the Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised.

The federal questions of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States were raised by argument of counsel for appellant on motion to dismiss on March 21, 1962 and March 26, 1962 in the Municipal Court of the Los Angeles District; and appellant's counsel's argument and brief before the District Court of Appeal, Second Appellate District, State of California, upon petition for writ of prohibition before said court, in paragraph XI thereof, which is quoted as follows:

> "That said respondent should be restrained from proceeding with said sentencing for the reason that the complaint herein is void and ineffectual to confer jurisdiction upon respondent court to try your petitioner for the offense charged therein on the following grounds:
>
> "The constitutional guarantee of due process afforded the petitioner by the United States Constitution and the 14th Amendment has been violated by said respondent, Municipal Court, in the following respects:
>
> "1. Section 40302 of the Vehicle Code provides that a person charged with violation of Section 23102(a) shall be taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest and most accessible with respect to the place where the arrest is made.

"2. Section 40306 of the Vehicle Code provides that in the event a person is arrested for a misdemeanor and is taken before a magistrate, the *arresting officer shall file* with the magistrate a complaint stating the offense with which the person is charged (emphasis added).

"3. Section 15 of the Vehicle Code provides that the word 'shall' is mandatory and the word 'may' is permissive.

"4. Where a statute restricts the making of a complaint to certain persons, it may be made by such person only.

"The unconditional guarantee of equal protection of the law afforded the petitioner by the United States Constitution and the 14th Amendment has been violated by said respondent court."

Appellant also raised the federal questions in his petitions for writs of prohibition and writs of *habeas corpus* before all of the other courts of the State of California in which said petitions have been filed by counsel for appellant.

The federal questions presented in this appeal were raised before the United States District Court for the Southern District of California, Central Division, in appellant's petition for a writ of *habeas corpus* which was filed August 20, 1965, and which was denied; but since that Honorable Body refused to grant a hearing on an order to show cause why the writ should not be issued, no evidence to support appellant's position before the United States District Court is available.

Conclusion.

Wherefore, Petitioner prays this Honorable Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals For the Ninth Circuit and make the following orders:

(1) Transfer this cause back to the United States Court of Appeals for the Ninth Circuit and direct them to order the proceeding remanded to the United States District Court for the Southern District of California, Central Division, and order the trial judge to allow Petitioner herein to amend his petition for writ of *habeas corpus,* and

(2) Instruct the United States District Court for the Southern District of California, Central Division, either to issue a writ of *habeas corpus* or to issue an order directing respondent to show cause why the writ should not be issued, and

(3) Have a hearing thereof, or

(4) Issue writ of *habeas corpus.*

Respectfully submitted,

JOHN N. FROLICH,
Attorney for Petitioner.

EXHIBIT A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Ramon Novarro, *Appellant,* vs. Peter Pitchess, Sheriff of the County of Los Angeles, State of California, *Appellee.* No. 20,649.

[November 14, 1966]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Hamley and Ely, Circuit Judges, and Solomon, District Judge

Per Curiam:

Ramon Novarro was convicted and sentenced in the Municipal Court of Los Angeles, California for a violation of section 23102 of the Vehicle Code of California. After certain state proceedings were had, Novarro applied to the federal district court for habeas corpus. He therein asserted that the state conviction and sentence deprived him of his constitutional rights under the Fourteenth Amendment. This deprivation, Novarro alleged, arose from the fact that the complaint charging him with a violation of section 23102 of the Vehicle Code was not filed by the arresting officer as mandatorily required by section 40306 of the Vehicle Code. The courts of California have upheld the conviction.

The district court, without hearing, dismissed the application upon the ground that it appears from the application that Novarro "is not entitled thereto," citing 28 U.S.C. §2243 (1964). Novarro did not file an